

FEDERAL ELECTION COMMISSION

**999 E Street, N.W.
Washington, D.C. 20463**

FIRST GENERAL COUNSEL'S REPORT

MUR: 6470

DATE COMPLAINT FILED: May 12, 2011

DATE OF NOTIFICATION: May 18, 2011

LAST RESPONSE RECEIVED: December 14, 2012

DATE ACTIVATED: August 30, 2011

ELECTION CYCLES: 2010, 2012

EXPIRATION OF SOL: January 13, 2016 to
April 15, 2016¹

MUR: 6482

DATE COMPLAINT FILED: July 21, 2011

DATE OF NOTIFICATION: July 27, 2011

LAST RESPONSE RECEIVED: December 14, 2012

DATE ACTIVATED: August 30, 2011

ELECTION CYCLES: 2010, 2012

EXPIRATION OF SOL: January 13, 2016 to
April 15, 2016

MUR: 6484

DATE COMPLAINT FILED: August 1, 2011

DATE OF NOTIFICATION: August 4, 2011

LAST RESPONSE RECEIVED: December 14, 2012

DATE ACTIVATED: August 30, 2011

ELECTION CYCLES: 2010, 2012

EXPIRATION OF SOL: January 13, 2016 to
April 15, 2016

COMPLAINTS:

New Hampshire Democratic Party (all MURs)

Alabama Democratic Party (MURs 6482 and 6484)

RESPONDENTS:

Mitt Romney

¹ The statute of limitations dates correspond to the violations for which we make reason-to-believe recommendations.

1 Romney for President, Inc. (f/k/a Romney for President
2 Exploratory Committee, Inc.) and Darrell Crate, in
3 his official capacity as treasurer
4 Free and Strong America PAC, Inc. and Darrell Crate
5 in his official capacity as treasurer
6 The Commonwealth PAC – Alabama (f/k/a Free and
7 Strong America PAC – Alabama), and Shauna Polk
8 in her official capacity as treasurer
9 The Commonwealth PAC – Iowa (f/k/a Free and
10 Strong America PAC – Iowa), and Shauna Polk
11 in her official capacity as treasurer
12 The Commonwealth PAC – Michigan (f/k/a Free and
13 Strong America PAC – Michigan), and Shauna Polk
14 in her official capacity as treasurer
15 The Commonwealth PAC – New Hampshire (f/k/a
16 Free and Strong America PAC – New Hampshire),
17 and Shauna Polk in her official capacity as treasurer
18 The Commonwealth PAC – South Carolina (f/k/a
19 Free and Strong America PAC – South Carolina),
20 and Shauna Polk in her official capacity as treasurer
21

22 RELEVANT STATUTES:

23 2 U.S.C. § 431(2), (4), (8)-(9)
24 2 U.S.C. § 432(e)
25 2 U.S.C. § 433(a)
26 2 U.S.C. § 434(a)-(b)
27 2 U.S.C. § 441a(a)(1)(A), (2)(A), (f)
28 2 U.S.C. § 441i(e)(1)(A)-(B)
29 11 C.F.R. § 100.52(d)(1)
30 11 C.F.R. § 101.1(a)
31 11 C.F.R. § 100.72
32 11 C.F.R. § 100.131
33 11 C.F.R. § 104.3
34 11 C.F.R. § 104.10(b)
35 11 C.F.R. § 106.6(b)(1)
36 11 C.F.R. § 110.2(f)
37 11 C.F.R. § 300.2(c)(2)
38 11 C.F.R. § 300.60(d)
39 11 C.F.R. § 300.61
40 11 C.F.R. § 300.62

41 INTERNAL REPORTS CHECKED: FEC Disclosure Reports

42 OTHER AGENCIES CHECKED: State Disclosure Reports

TABLE OF CONTENTS

1			
2			
3	I.	INTRODUCTION	1
4	II.	BACKGROUND	2
5	A.	Factual Background.....	2
6	1.	Romney and Romney for President	2
7	2.	Free and Strong America	2
8	3.	The State PACs	3
9	4.	Romney's Disassociation with the State PACs and	
10		Announcement of His Candidacy for President.....	4
11	B.	Procedural Background.....	5
12	1.	The Complaints	5
13	2.	The Responses	6
14	III.	ANALYSIS.....	9
15	A.	There is Reason to Believe That Free and Strong America Made	
16		Excessive In-Kind Contributions to Romney and Romney for	
17		President by Funding Testing-the-Waters Activity	9
18	1.	Romney Engaged in Testing-the-Waters Activity Prior to	
19		April 11, 2011	10
20	a.	Romney's Public Statements Indicating He Was	
21		Considering Whether to Run for President	11
22	b.	Hiring of Romney Campaign Staff	13
23	c.	Romney's Public Statements Concerning the	
24		Presidency	15
25	d.	Events Designed to Build Support and Solicit	
26		Donations for a Romney Presidential Campaign.....	18
27	2.	Free and Strong America Paid for Romney's Testing-the-	
28		Waters Activity in Amounts Likely in Excess of \$5,000	23
29	B.	There is Reason to Believe That Romney and Romney for	
30		President Failed to Report Receipts and Disbursements Made	
31		During the Testing-the-Waters Period	26

MURs 6470, 6482, and 6484 (Mitt Romney *et al.*)
First General Counsel's Report

1	C..	There is No Reason to Believe That the State PACs Made	
2		Excessive In-Kind Contributions to Romney and Romney for	
3		President.....	27
4	D.	There is No Reason to Believe That Excessive Contributions to	
5		Romney and Romney for President Resulted from Donations to the	
6		State PACs.....	28
7	E.	The Commission Should Take No Action on the Complaint's	
8		Allegation That Romney Violated the Act if the State PACs Raised	
9		or Spent Non-Federal Funds After Romney Became a Candidate	29
10	IV.	INVESTIGATION.....	31
11	V.	RECOMMENDATIONS.....	31
12			

I. INTRODUCTION

The three complaints in these matters allege that 2012 Republican presidential candidate Mitt Romney and his principal campaign committee, Romney for President, Inc. and Darrell Crate in his official capacity as treasurer ("Romney for President"), used Romney's leadership PAC and a network of state political committees to help finance Romney's 2012 presidential campaign in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). Before declaring his 2012 candidacy, Romney served as the honorary chairman of a nonconnected multicandidate political committee, Free and Strong America PAC² ("Free and Strong America"), and its five affiliated state political committees³ (the "State PACs"). The complaints contend that (1) Free and Strong America and the State PACs made excessive in-kind contributions to Romney and Romney for President by paying for expenses that Romney for President should have paid; (2) Romney and Romney for President accepted excessive contributions from donors to the State PACs; and (3) the State PACs impermissibly raised and spent non-federal funds after Romney became a candidate.

Respondents deny violating the Act. As detailed below, we recommend that the Commission find reason to believe that Free and Strong America made excessive in-kind contributions to Romney by paying for testing-the-waters activity that Romney engaged in before he filed his Statement of Candidacy on April 11, 2011. We also recommend that the Commission find reason to believe that Romney and Romney for President knowingly accepted those in-kind contributions, and that Romney for President failed to report its testing-the-waters activity to the Commission.

² Darrell Crate was the treasurer for Free and Strong America PAC.

³ The State PACs are: The Commonwealth PAC – Alabama, The Commonwealth PAC – Iowa, The Commonwealth PAC – Michigan, The Commonwealth PAC – New Hampshire, and The Commonwealth PAC – South Carolina. Shauna Polk is the treasurer for each of the State PACs.

1 We further recommend that the Commission find no reason to believe that the State
2 PACs made excessive in-kind contributions to Romney and Romney for President, and no reason
3 to believe that donations made to the State PACs resulted in excessive contributions. We
4 recommend that the Commission take no action on the complaints' allegations that the State
5 PACs impermissibly received and spent non-federal funds after Romney became a 2012
6 presidential candidate.

7 Finally, we recommend that the Commission authorize an investigation to determine the
8 nature and scope of Romney's apparent testing-the-waters activities and the amount of
9 expenditures Free and Strong America made for those activities.

10 II. BACKGROUND

11 A. Factual Background

12 1. Romney and Romney for President

13 Romney was a candidate for President of the United States in 2008 and 2012.⁴ His
14 principal campaign committee, Romney for President, registered with the Commission on
15 February 13, 2007.⁵ After Romney withdrew his 2008 candidacy in February 2008, Romney for
16 President continued to file periodic reports with the Commission.

17 2. Free and Strong America

18 Free and Strong America registered with the Commission as a nonconnected political
19 committee on April 25, 2008.⁶ Romney served as Free and Strong America's honorary
20 chairman. Romney Resp. at 1 (June 10, 2011); Second Romney Resp. at 1 (Mar. 28, 2012).

⁴ Mitt Romney, Amended Statement of Candidacy (Feb. 13, 2007).

⁵ Romney for President, Inc., Amended Statement of Organization (Feb. 13, 2007).

⁶ Free and Strong America PAC, Inc., Statement of Organization (Apr. 25, 2008). Free and Strong America became a multicandidate political committee on October 31, 2008. Free and Strong America PAC, Inc., Notification of Multicandidate Status (Oct. 31, 2008).

1 Free and Strong America spent funds to contribute to federal and state candidates, conduct
2 "research to help those candidates communicate their positions on issues, travel around the
3 country to assist candidates and build federal and state political parties, [and] communicat[e] on
4 important policy topics." Romney Resp. at 2.

5 Free and Strong America states that it used funds raised subject to the Act's limits and
6 prohibitions (*i.e.*, federal funds) to pay for all of its fundraising, events, websites, e-mail, direct
7 mail expenses, and contributions to federal candidates. *See* Romney Resp. at 2. According to
8 the Complaint, Free and Strong America also used federal funds to pay for half of its
9 administrative expenses, such as pay for employees and contractors, travel, phone bills, office
10 supplies, and other overhead costs. Compl. at 2, Exs. A at 2, B at 4-5, C at 2-4, MUR 6470 (May
11 12, 2011) ("Complaint").⁷ To pay for the other half of its administrative expenses, Free and
12 Strong America used non-federal funds transferred from its five affiliated state political
13 committees. *Id.* at 2, Exs. A-C; State PACs Resp. at 1 (June 28, 2011); Romney Resp. at 1-2.⁸

14 3. The State PACs

15 Free and Strong America's five affiliated state committees were each also named "Free
16 and Strong America PAC," followed by the name of its particular state — Alabama, Iowa,
17 Michigan, New Hampshire, or South Carolina. State PACs Resp. at 1; Romney Second Resp. at
18 1. Romney also served as their honorary chairman "[d]uring much of the PACs' four-year
19 existence." State PACs Resp. at 1; *see* Romney Second Resp. at 1.

20 In some cases, donors reportedly made five- and six-figure donations to particular State
21 PACs, where permitted by the laws of the state in which the committee was registered. Compl.

⁷ *See, e.g.*, Free and Strong America PAC, Inc., 2010 March Monthly Report, Sched. H (Mar. 19, 2010).

⁸ *See, e.g., id.*

1 at 2, Ex. A, Ex. B at 3. And some of those donors publicly stated that they donated large
2 amounts to the State PACs to assist the then-unannounced, but anticipated Romney presidential
3 campaign. Compl. at 2. For example, Richard and Donna Marriott reportedly contributed
4 \$215,000 to the State PACs, and Richard Marriott said he did so because "the country could use
5 Romney's business acumen." *Id.*, Ex. C at 1, 5.

6 From January 1, 2009, through June 30, 2010, the State PACs reportedly raised \$486,700
7 combined from 24 individuals. Compl., Ex. B. at 3-4. In 2010, the State PACs allegedly raised
8 approximately \$1.5 million. *Id.* at 1. Allegedly, the State PACs made some donations to state
9 and local candidates, but transferred the vast majority of their funds to Free and Strong America.
10 *Id.* at 2, Ex. B. at 4; Compl. at 2, MUR 6482 (July 21, 2011) (the "Second Complaint").

11 4. Romney's Disassociation with the State PACs and Announcement of His
12 Candidacy for President

13 On March 31, 2011, Romney and Free and Strong America ended their association with
14 the State PACs. Romney Resp. at 1; State PACs Resp. at 2. The State PACs changed their
15 names to "The Commonwealth PAC," followed by the name of the state in which they were
16 organized. Romney Resp. at 1. Some Romney for President employees then administered the
17 shutdown of Free and Strong America, which thereafter became "effectively dormant." *Id.*

18 On April 11, 2011, Romney filed a letter with the Commission informing it that he had
19 reached the legal threshold for candidacy under the Act. Romney Resp. at 2.⁹ Romney for

⁹ Letter from Mitt Romney to FEC (Apr. 11, 2011), available at <http://docquery.fec.gov/pdf/584/11930636584/11930636584.pdf>. In the April 11 letter Romney stated, "I have reached the legal threshold for filing FEC Form 2. Thus, please accept this letter as my FEC form 2 in order to ensure compliance with the Federal Election Campaign Act. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 100.3(a)(1)." *Id.* In his response to the Complaint, Romney again described his April 11, 2011 letter as a "Form 2 letter." Romney Resp. at 2 ("On April 11, 2011, Mr. Romney announced the formation of his 2012 presidential exploratory committee. On the same day, he filed a Form 2 letter . . ."). As a result, we treat April 11, 2011 as the date Romney declared his candidate status under the Act even though more than two months later, on June 22, 2011, Romney filed an actual FEC Form 2. See Mitt Romney, FEC Form 2 Statement of Candidacy (June 22, 2011).

1 President's 2011 July Quarterly report indicates that Romney for President received its first
2 contributions on that date in amounts exceeding \$5,000.¹⁰ Within 30 days, Romney for President
3 purchased Free and Strong America's assets at fair market value. Romney Resp. at 2; Second
4 Romney Resp. at 2.¹¹ Respondents state that "[s]ome former [Free and Strong America] staffers
5 and consultants" became employees of Romney for President. Second Romney Resp. at 2. After
6 Romney filed for candidacy, the State PACs "continue[d] to exist and operate" and, as of June
7 2011, had no plans to terminate. State PACs Resp. at 2.

8 **B. Procedural Background**

9 **1. The Complaints**

10 Three separate complaints alleging substantially identical violations were filed between
11 May and July 2011.¹² Because the complaints raise identical issues, we address the allegations
12 raised in the May 12, 2011, Complaint filed by the New Hampshire Democratic Party in MUR
13 6470. Compl. at 1. The Complaint alleges various violations of the Act by Romney, Romney
14 for President, Free and Strong America, and the State PACs arising generally out of three
15 transactions.

¹⁰ Romney for President, 2011 July Quarterly Report (July 15, 2011).

¹¹ Disclosure reports reflect that between April 22 and June 30, 2011, Romney for President paid Free and Strong America over \$500,000 for assets including phone systems, web domain names, fundraising lists, and furniture. *See* Romney for President, Amended 2011 July Quarterly Report (Jan. 27, 2012).

¹² On July 21 and August 1, 2011, the Commission received two identical complaints that largely repeat the allegations contained in the MUR 6470 Complaint. The July 21, 2011 Complaint (the "Second Complaint"), designated MUR 6482, was submitted by the New Hampshire Democratic Party. Second Compl. (July 21, 2011), MUR 6482. The August 1, 2011 Complaint (the "Third Complaint"), designated MUR 6484, was submitted by the Alabama Democratic Party. Third Compl. (Aug. 1, 2011), MUR 6484. The Second and Third Complaints both name Romney and Romney for President as respondents, and were also submitted to state election and ethics authorities in Alabama, New Hampshire, Iowa, Michigan, and South Carolina. *See* Second Compl. at 1; Third Compl. at 1. Romney, Romney for President, Free and Strong America, and the State PACs requested that their responses to the MUR 6470 Complaint serve as their responses to the Second and Third Complaints. Romney Resp. at 1 (Aug. 15, 2011), MURs 6482, 6484; State PACs Resp. at 1 (Aug. 4, 2011), MURs 6482, 6484. In this report, we generally cite only to the MUR 6470 Complaint when discussing allegations made by all Complainants unless otherwise noted.

1 First, the Complaint claims that Romney and Romney for President accepted
2 contributions in excess of the Act's limits from donors to the State PACs. Compl. at 3. Second,
3 the Complaint claims that Free and Strong America and the State PACs made excessive in-kind
4 contributions to Romney and Romney for President by "pay[ing] for expenses that should have
5 been paid for by [Romney's] presidential campaign," such as compensation for campaign
6 staffers and consultants. Compl. at 4. Third, the Complaint alleges that Romney violated
7 2 U.S.C. § 441i(e)(1) if, after he became a candidate, the State PACs raised and spent non-
8 federal funds. Compl. at 5.

9 2. The Responses

10 Respondents deny that they violated the Act. Romney, Romney for President, and Free
11 and Strong America ("Romney Respondents") state, first, that the State PACs did not violate the
12 Act's limits by accepting contributions in accordance with state campaign finance laws, and that
13 it is irrelevant whether the donors to those state committees intended for their donations to assist
14 Romney's then-anticipated presidential campaign. Romney Resp. at 3. Second, the Romney
15 Response denies that Romney or Romney for President ever accepted any in-kind contributions
16 from Free and Strong America or the State PACs. Romney Resp. at 3. Third, the Romney
17 Response stresses that Romney ended his affiliation with the State PACs before becoming a
18 federal candidate and, therefore, claims that Romney has not solicited, received, or spent non-
19 federal funds as a candidate. *Id.* at 4. The State PACs' Response denies that they accepted
20 excessive contributions under the Act, and that they have ever spent funds for the purpose of
21 influencing a federal election. State PACs Resp. at 2-3.

22 The Complaint alleges that the "evidence on the public record suggests that Mr. Romney
23 may have used funds from his Federal and State PACs to pay for expenses that should have been
24 paid for by his presidential campaign." Compl. at 4. Consequently, the Office of General

1 Counsel ("OGC") reviewed information available on the public record concerning Romney's
2 activities immediately prior to the April 11, 2011 filing of his statement of candidacy. That
3 public information suggests that during that time Romney may have engaged in so-called
4 "testing the waters" activities, that is, "activities . . . conducted to determine whether an
5 individual should become a candidate." 11 C.F.R. §§ 100.72(a), 100.131(a).

6 Because the Responses did not address whether Romney was testing the waters, on
7 February 23 and 27, 2012, OGC informed the Respondents that the Complaint suggested that
8 Free and Strong America and the State PACs may have made, and Romney and Romney for
9 President may have accepted, excessive or prohibited in-kind contributions in connection with
10 testing-the-waters activities. In its correspondence, OGC provided the Respondents with certain
11 publicly available news reports that indicated that Romney may have engaged in testing-the-
12 waters activities prior to his candidacy, and offered the Respondents the opportunity to respond
13 to that allegation in particular. See Letter from Roy Q. Luckett, Acting Assistant Gen. Counsel
14 for Enforcement, FEC to Benjamin L. Ginsberg, Patton Boggs, LLP and Kathryn E. Biber,
15 Romney for President, Inc. at 1-2, Attachs. A-N (Feb. 23, 2012) ("February 23 Letter"); see also
16 Letter from Roy Q. Luckett, Acting Asst. Gen. Counsel for Enforcement, FEC, to Kirk Jowers
17 and Matthew Sanderson, Caplin & Drysdale at 2 (Feb. 27, 2012); Letter from Roy Q. Luckett,
18 Acting Asst. Gen. Counsel for Enforcement, FEC, to Benjamin L. Ginsberg, Patton Boggs LLP
19 at 2 (Feb. 27, 2012).¹³

¹³ We contacted the Respondents following Executive Session discussions concerning a previously circulated First General Counsel's Report in these matters that was subsequently withdrawn. See Memo to the Comm'n, MURs 6470, 6482, 6484 (Mitt Romney *et al.*) (Jan. 31, 2012) ("This Office is withdrawing the First General Counsel's Report in MURs 6470, 6482, and 6484, and will notify the respondents of additional publicly available information related to the allegations therein and provide them with an opportunity to respond. After evaluating any responses, we will make appropriate recommendations to the Commission.").

1 In response, the Romney Respondents asserted that Romney had not engaged in any
2 testing-the-waters activity or accepted any in-kind contributions from Free and Strong America.
3 Second Romney Resp. at 1. The Second Romney Response further denies that any of the events
4 described in the news articles qualifies as testing-the-waters activity. *Id.* at 1-6. Similarly, the
5 State PACs' Response dismisses the media reports as speculation and states that the State PACs
6 never spent any funds to influence the presidential election. Second State PACs Resp. at 1-2
7 (Mar. 12, 2012).

8 The Second Romney Response states that at events held in March 2011, Romney
9 supporters voluntarily committed to raise money for Romney if he chose to run for president.
10 Second Romney Resp. at 5. As a result, OGC asked the Romney Respondents to clarify whether
11 these voluntary commitments were solicited, and if so, by whom. E-mail from Tracey L. Ligon,
12 Att'y, FEC, to Kathryn Biber, Romney for President (Nov. 29, 2012, 01:20 EST) ("November 29
13 E-mail"). Romney and Romney for President responded on December 6, 2012, but chose not to
14 further clarify the information that OGC noted from the prior response. *See* Letter from
15 Benjamin L. Ginsberg, National Counsel, Romney for President and Katie Bieber, Gen. Counsel,
16 Romney for President to Tracey L. Ligon, Att'y, FEC (Dec. 6, 2012) ("Third Romney
17 Response").

1 **III. ANALYSIS**

2 **A. There is Reason to Believe That Free and Strong America Made Excessive**
3 **In-Kind Contributions to Romney and Romney for President by Funding**
4 **Testing-the-Waters Activity**
5

6 We recommend that the Commission find reason to believe that Free and Strong America
7 made excessive in-kind contributions to Romney for President by paying for testing-the-waters
8 activity that Romney engaged in before he filed his Statement of Candidacy.¹⁴

9 The Act limits contributions from a multicandidate political committee to a federal
10 candidate or the candidate's authorized committee to \$5,000 per election. 2 U.S.C.
11 § 441a(a)(2)(A). "Contributions" may consist of "anything of value," *id.* § 431(8)(A)(i),
12 including an "in-kind contribution[]," which is "the provision of any goods or services without
13 charge or at a charge that is less than the usual and normal charge for such goods or services."
14 11 C.F.R. § 100.52(d)(1). A multicandidate political committee makes an in-kind contribution to
15 a future federal candidate's campaign when it pays for the future candidate to conduct testing-
16 the-waters activities under 11 C.F.R. §§ 100.72(a), 100.131(a). *See* Advisory Op. 1981-32
17 (Askew) at 5 ("AO 1981-32") (explaining that "in kind gifts or loans of goods or services
18 provided in connection with . . . testing the waters activities" are contributions under the Act);
19 Statement of Reasons, Comm'rs. Petersen, Hunter, McGahn II, Walther & Weintraub at 3, MUR
20 5908 (Duncan Hunter) (same). In-kind contributions to a candidate for testing-the-waters and

¹⁴ The Complaint also alleges that Free and Strong America made excessive in-kind contributions to Romney and Romney for President under 11 C.F.R. § 110.2(f). Compl. at 4. We recommend that the Commission find no reason to believe that Free and Strong America made any such contributions. Under section 110.2(f), certain expenditures by a multicandidate political committee are deemed in-kind contributions to a Presidential candidate "even though made before the individual becomes a candidate." Such expenditures include those made for polling expenses relating to the candidate, compensation and administrative expenses in connection with establishing offices in Presidential primary states, and expenses of individuals seeking to become delegates. *Id.* § 110.2(f)(1)(iii). The Romney Response denies that Free and Strong America made any section 110.2(f) expenditures, the Complainants do not specifically allege that Free and Strong America made any particular expenditures described by section 110.2(f), and the available public information does not indicate otherwise.

1 campaign activity are aggregated and subject to the \$5,000 per-election contribution limit of
2 section 441a(a)(2)(A). Advisory Op. 1985-40 at 3 (Republican Majority Fund) ("AO 1985-40");
3 *see also* Leadership PACs, 68 Fed. Reg. 67,013, 67,017 (Dec. 1, 2003) ("To the extent that
4 leadership PACs are used to pay for costs that could and should otherwise be paid for by a
5 candidate's authorized committee, such payments are in-kind contributions, subject to the Act's
6 contribution limits and reporting requirements.").

7 Testing-the-waters activities are those "conducted to determine whether an individual
8 should become a candidate." 11 C.F.R. §§ 100.72(a), 100.131(a). They include, but are not
9 limited to "conducting a poll, telephone calls, and travel." *Id.* §§ 100.72(a), 100.131(a). The
10 Commission has described testing-the-waters activities as those undertaken while an individual
11 "continues to deliberate his decision to become a presidential candidate." AO 1981-32 at 4.

12 1. Romney Engaged in Testing-the-Waters Activity Prior to April 11, 2011.
13

14 We conclude that the complaints, responses, and publicly available information together
15 indicate that Romney engaged in numerous activities between January and March 2011 of a type
16 that indicates he was weighing whether to run for federal office before he filed his Statement of
17 Candidacy on April 11, 2011. Specifically, the following events suggest that Romney was
18 testing the waters for his future campaign for federal office between January and March 2011:

- 19 • January 13, 2011 — hiring of advisors Rich Beeson and Neil Newhouse. *See*
20 February 23 Letter, Attach A.
- 21 • February 4, 2011 — Boston fundraiser. *See id.*, Attach. F.
- 22 • February 18, 2011 — meeting in Utah. *See id.*, Attach. G.
- 23 • March 5, 2011 — Romney speech in New Hampshire. *See id.*, Attach. J.
- 24 • March 8, 2011 — *BostonHerald.com* editorial. *See id.*, Attach. K.
- 25 • March 9, 2011 — meeting with donors in Fort Lauderdale, FL. *See id.*, Attach. D.

- 1 • March 21, 2011 — interview with Hugh Hewitt. *See id.*, Attach. N.
- 2 • March 22, 2011 — *National Review Online* editorial. *See id.*, Attach. L.
- 3 • March 22, 2011 — Washington, DC fundraiser. *See id.*, Attachs. H-I.
- 4 • March 24, 2011 — New York City fundraiser. *See id.*, Attachs. H-I.
- 5 • March 30, 2011 — *USA Today* editorial. *See id.*, Attach. M.

6 As set forth below, these events all fall within one or more of four types of activities that
7 the Commission has concluded indicate that a candidate may have been testing the waters:

- 8 (1) public statements by Romney indicating he was considering whether to run for president;
9 (2) hiring of Romney campaign staff; (3) public statements by Romney concerning the office of
10 the presidency; and (4) solicitation of support or donations for a Romney presidential campaign.

11 a. Romney's Public Statements Indicating He Was Considering
12 Whether to Run for President

13 From February 4 through March 21, 2011, Romney reportedly made repeated statements
14 indicating that he was considering whether to run for president. The Commission has previously
15 determined that "remarks at . . . events [that] indicate [a person's] potential interest in, and his
16 ongoing consideration of whether to seek, the . . . presidential nomination," qualify the event as a
17 testing-the-waters event. AO 1985-40 at 6-7. Indeed, as the State PACs' Second Response
18 recognizes, "[a]n individual's statements (or the statements of an individual's agent) about his
19 own potential candidacy are relevant" to the testing-the-waters inquiry. Second State PACs
20 Resp. at 1 (Mar. 12, 2012).

21 On February 4, 2011, Romney reportedly hosted a meeting for dozens of his top
22 supporters and fundraisers in Boston. February 23 Letter, Attach. F. A person who attended the
23 event reported that "[w]hile Romney indicated he has not made a final decision, he gave every

1 indication he intends to make a formal announcement this spring, probably in late April or early
2 May." *Id.*

3 On February 18, 2011, Romney reportedly met "privately with Utah supporters of his
4 2008 presidential bid." *Id.*, Attach. G. When asked by reporters "if he would count on Utah to
5 back another run, Romney said, 'it depends on what we decide to do.'" *Id.* His wife told
6 reporters, "'he'd make a great president.'" *Id.*

7 On March 9, 2011, Romney and officials from Free and Strong America reportedly met
8 with major donors at an event in Fort Lauderdale, Florida. *Id.*, Attach D. The invitation for the
9 event described it as a "'regional organizational meeting' for 'the Romney Leadership Team,' at
10 which Romney was to 'discuss his plans for the 2012 elections,'" and where "Romney staffers"
11 were to give "'a political briefing,'" including "'polling numbers, media appearances and other
12 political activities.'" *Id.* at 3.

13 Finally, during an interview on March 21, 2011, radio personality Hugh Hewitt asked
14 Romney on his national radio show whether Romney would be announcing the formation of an
15 exploratory committee soon. *Id.*, Attach. N. Romney responded: "I have an idea, Hugh, but I'd
16 tell you quietly, but I'm afraid you'd let your listeners know, so I'll have to be giving that some
17 thought, but no definitive plans right now." *Id.*

18 Romney's reported remarks at these four events demonstrate that as early as February 4,
19 2011, Romney was considering whether to seek the presidential nomination. Although in many
20 cases Romney stated that he had not come to a final decision on whether to run, his comments
21 show that there was a decision to be made about seeking the presidency, and that he was "giving
22 that some thought." *Id.* These statements demonstrate Romney's "ongoing consideration of

1 whether to seek, the . . . presidential nomination," which the Commission has identified as
2 testing-the-waters activity. AO 1985-40 at 6-7.

3 The Romney Respondents' Second Response denies that these events were testing-the-
4 waters events. Second Romney Resp. at 4, 6. That Response, however, does not address the
5 statements these reports attribute to Romney or deny that Romney made them. *See id.* The
6 Romney Respondents point out that "[g]iven the timing of the event[s], it was natural that
7 attendees would ask Governor Romney about whether he planned to run for president." *Id.* at 4.
8 That argument, however, misses the mark: Because Romney's undisputed response was that he
9 was giving thought to running and had yet to make a final decision whether to run, the articles
10 show that he was considering becoming a candidate and thus was testing the waters.

11 The State PACs argue that because Romney did not commit to running for president in
12 his comments, he was not yet testing the waters. *See* Second State PACs Resp. at 1 n.2. In a
13 news report, Romney spokesperson Eric Fehrnstrom made a similar argument, claiming that the
14 Romney meeting with donors in Fort Lauderdale was not a testing-the-waters event because
15 Romney did not "advocate[] his election as president []or raise[] any funds for a presidential
16 campaign." February 23 Letter, Attach. D. But these arguments confuse testing the waters with
17 actual candidacy — all that is required for testing the waters is that the individual was merely
18 *considering* running for president, and Romney's unrebutted statements show that he was
19 considering such a run on each of those occasions.

20 b. Hiring of Romney Campaign Staff

21 A January 13, 2011 news article reports that "Romney ha[d] secured both a pollster and
22 a political director for his near-certain presidential bid," citing "sources connected to Romney's
23 2008 presidential effort." February 23 Letter, Attach. A. The article names Neil Newhouse as
24 the pollster and Rich Beeson as the political director. *Id.*

1 On its face, this information indicates that Romney was likely conducting activities to
2 determine whether to become a candidate by hiring Beeson and Newhouse for his "near-certain"
3 campaign. The Commission has explained that an individual is testing the waters by employing
4 "political consultants for the purpose of assisting with advice on the potential mechanics of
5 constructing a national campaign organization." AO 1981-32 at 2, 5. Additionally, the
6 Commission has previously concluded that the "[e]mployment of a specialist in opinion research
7 to conduct polls for the purpose of determining the feasibility of a national campaign" is testing-
8 the-waters activity. *Id.* at 3-4.

9 The Second Romney Response confirms that, at some point, Beeson and Newhouse
10 worked for or provided services to Romney for President. Second Romney Resp. at 3. The
11 Romney Respondents state that at the time of the article, Beeson "had not been hired as the
12 nonexistent campaign's political director," but do not similarly deny that Newhouse was hired at
13 that time to be a pollster for a future Romney presidential campaign. *Id.* The Romney
14 Respondents state that at the time of the article, Beeson was providing services to Free and
15 Strong America through his company, FLS Connect, and that at some unspecified time
16 Newhouse also provided services to Free and Strong America through his company, Public
17 Opinion Strategies, Inc. *Id.* Finally, the Romney Respondents also state that Free and Strong
18 America's payments to Beeson and Newhouse through their companies were for services
19 provided to Free and Strong America. *Id.*

20 The report that Newhouse was hired at the time of the January 13, 2011 article to be a
21 pollster for the Romney 2012 presidential campaign remains unrebutted. Although the Romney
22 Respondents claim that Beeson and Newhouse were paid by Free and Strong America for
23 services they provided to Free and Strong America, this contention fails to address the key issue:

1 whether those services were testing-the-waters activities that Free and Strong America funded
2 for Romney. To that point, the Second Romney Response does not deny that the services
3 provided by Beeson and Newhouse through their engagement with Free and Strong America was
4 to provide Romney with advice concerning the near-certain presidential campaign he was
5 reportedly then considering.¹⁵ And it is no answer for Respondents simply to assert that the
6 campaign was "nonexistent" at the time of the hires in question, Second Romney Resp. at 3,
7 given that testing-the-waters activity is, by definition, always conducted prior to the candidate's
8 declaration of candidacy.¹⁶

9 c. Romney's Public Statements Concerning the Presidency

10 On March 8, 22, and 23, 2011, editorials by Romney criticizing President Obama on
11 various policy issues appeared in the media. February 23 Letter, Attachs. K-M. On March 5,
12 2011, Romney made a public speech calling for a new president. *Id.*, Attach. J.

13 The Commission has previously determined that "arranging for the publication of articles
14 [by an individual] in newspapers and periodicals" is testing-the-waters activity where it takes

¹⁵ In MUR 6216 (Coakley for Senate), the respondents similarly failed to deny that consultants hired by a future federal candidate's state committee were paid by the state committee to perform work benefiting the future candidate's impending federal campaign. Statement of Reasons, Comm'rs. Petersen, Bauerly, Hunter, McGahn II & Weintraub at 6-7, MUR 6216 (Coakley for Senate). The Commission, however, voted to dismiss allegations that the state committee's payments to the consultants violated the Act given the "minimal" amount of payments involved. *Id.* at 7. Three consultants there were paid a total of \$29,716. *Id.* at 3 & n.8. In contrast here, Free and Strong America paid Beeson's company alone in excess of \$105,000 between January 13 and April 11, 2011. See Free and Strong America PAC, Inc., Amended 2011 Mid-Year Report at 622, 623-24 (Feb. 14, 2012).

¹⁶ Two additional news articles attached to the February 23 Letter report that Romney hired staff in March 2011, but, in contrast to Attachment A, neither of those articles supports our conclusion here that Romney tested the waters by hiring staff. First, a March 3, 2011 report states that Free and Strong America hired Andrea Saul as a communications adviser. February 23 Letter, Attach. C. Although the letter states this hire was made "as [Romney] readies for a second presidential campaign," the article does not state that Saul was hired to work for the campaign. Second, a March 31, 2011 article indicates that Free and Strong America hired Lanhee Chen as policy director on March 31, 2011. February 23 Letter, Attach. E. As the Second Romney Response points out, however, that letter indicates only "that Lanhee Chen served as a policy advisor to [Free and Strong America], not any nascent campaign." Second Romney Resp. at 4.

1 place in a context indicating the individual is deliberating a decision to run for federal office.

2 AO 1981-32 at 2, 4.¹⁷

3 Here, on March 8, 2011, Romney authored an editorial appearing on *BostonHerald.com*,
4 where he criticized President Obama's economic policies and stated, "I hope we don't have to
5 wait two years for a new president to fix things, but I fear we might." February 23 Letter,
6 Attach. K. On March 22, 2011, in the *National Review Online*, Romney wrote an editorial
7 criticizing the President's health-care policy, and declaring, "If I were president, on Day One I
8 would issue an executive order paving the way for Obamacare waivers to all 50 states." *Id.*,
9 Attach. L. On March 30, 2011, Romney wrote an editorial appearing in *USA Today* that was
10 critical of the President's record on job creation. *Id.*, Attach. M. Romney described his plan for
11 "[c]reating good, lasting jobs," and then declared that "leadership is required," and "[w]e don't
12 have that leadership now." *Id.* In addition to the editorials, Romney made contemporaneous
13 public appearances where he also criticized the President. Speaking in New Hampshire on
14 March 5, 2011, Romney declared that, "It's going to take more than new rhetoric to put
15 Americans back to work — it's going to take a new president." *Id.*, Attach. J

16 These editorials and public statements suggest that Romney was considering whether to
17 become a candidate for president. In particular, Romney's repeated suggestions that the
18 president should be replaced, and explanations of what his own policies would be if he were
19 president instead, indicate at the very least that Romney was gauging whether there would be
20 public support for him to campaign to replace President Obama. Romney's statements are at

¹⁷ Indeed, the Commission has recognized that such publication may indicate that an individual has crossed the line from testing the waters into actual candidacy, since it "envisage[s] considerable public contact and could entail a purposeful, active effort to gain all possible political benefit from th[at] contact[]." AO 1981-32 at 4. Also, it would "appear to project [the author] to the public as a person qualified to be taken seriously as a presidential contender." *Id.* at 5 (explaining that "planning and scheduling public activities designed to heighten [one's] appeal to the electorate" indicates one had decided to become a candidate).

1 least as strong as those statements the Commission has previously considered to be indicative of
2 testing the waters. For example, in MUR 5661 (Butler), the Commission approved a testing-the-
3 waters recommendation based on statements of a potential candidate that the incumbent was
4 vulnerable and that “[o]ur state needs more assistance from Washington.” First Gen’l Counsel’s
5 Rpt. at 13-16. More recently, in MUR 6501 (Brunner), three Commissioners agreed with OGC’s
6 assessment that a candidate’s statement that he was “very serious” and “ready to jump right in”
7 were indicative of testing the waters, but not candidate status. *See* Certification, MUR 6501
8 (Brunner) (Jan. 31, 2013); First Gen’l Counsel’s Rpt. at 7, MUR 6501 (Brunner) (Nov. 9, 2012).
9 And the other two Commissioners disagreed not because the statements failed to indicate testing-
10 the-waters status, but because they believed those statements went further and demonstrated that
11 the respondent had become a candidate. Statement of Reasons, Comm’rs Weintraub and
12 Walther at 3 (Mar. 4, 2013).¹⁸ Romney’s statements become particularly compelling given the
13 context in which the editorials and statements arose. Romney, a candidate for president in the
14 prior election, published multiple editorials within a three-week span just days before registering
15 formally with the Commission as a presidential candidate on April 11, 2011. And Romney’s
16 statements were contemporaneous with his other explicit statements that he was weighing a run
17 for president, *see supra* Part III.A.1.a, his reported efforts to hire campaign staff, *see supra* Part
18 III.A.1.b, and his reported efforts to solicit donations for his presidential campaign, *see infra* Part
19 III.A.1.d.

20 In response, the Romney Respondents stated that Romney “had a First Amendment right
21 to criticize President Obama,” and his protected speech was not testing-the-waters activity.

¹⁸ Romney’s references to the then-upcoming presidential election, to the need for a “new president,” and to what he would do “if [he] were president,” distinguishes this matter from MUR 6430 (Daines). There, the Commission determined that a candidate was not testing the waters where he appeared in an advertisement that “did not even indirectly refer to an election or the possible candidacy of [the individual].” Factual and Legal Analysis at 10, MUR 6430 (Daines).

1 Second Romney Resp. at 5-6. To be sure, Romney's statements regarding the President are
2 protected by the First Amendment. But those statements are nevertheless indicative of testing-
3 the-waters activity and may trigger duties under the Act. *See* First Gen. Counsel's Rpt. at 15-16,
4 MUR 5661 (Butler) (stating that while potential candidate's critiques of incumbent came close to
5 crossing over the testing-the-waters line into candidate status, these statements still only
6 indicated testing-the-waters status). Nor does the First Amendment character of Romney's
7 public statements preclude consideration of them for their evidentiary value in assessing his
8 then-existing state of mind concerning a potential candidacy or in making the testing-the-waters
9 determination. *Cf. Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment . . .
10 does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove
11 motive or intent.").

12 d. Events Designed to Build Support and Solicit Donations for a
13 Romney Presidential Campaign

14 Publicly available information indicates that from early February until at least late March
15 2011, Romney and Free and Strong America staff held four events designed to discuss and
16 consider plans, build support, and raise money for Romney's 2012 presidential campaign.

17 First, on February 18, 2011, Romney reportedly met "privately with Utah supporters of
18 his 2008 presidential bid" as part of a "40-state tour to thank supporters and presumably build
19 support for his as yet-unannounced run for the GOP presidential nomination in 2012." February
20 23 Letter, Attach. G. When "[a]sked if he would count on Utah to back another run, Romney
21 said, 'it depends on what we decide to do.'" *Id.* His wife told reporters, "'he'd make a great
22 president.'" *Id.*

23 The Romney Respondents state that this was a Free and Strong America event, not a
24 Romney testing-the-waters event. Second Romney Resp. at 4. As discussed above, they do not

1 deny, however, that Romney stated at the event that he was “decid[ing]” what to do when it
2 came to “another run” for president. *See* AO 1981-32 at 4 (testing-the-waters activities are those
3 undertaken while an individual “continues to deliberate his decision to become a presidential
4 candidate”). They also do not deny that Romney was in fact building support for his yet-
5 unannounced presidential run. *See id.* at 5 (activity “oriented to ascertaining whether there is an
6 initial base of support adequate to launch a campaign effort” is testing-the-waters activity).

7 Second, on March 9, 2011, “Romney and finance officials from his Free and Strong
8 America political action committee huddled with major donors at a meeting in the Fort
9 Lauderdale area,” according to a news report. *Id.*, Attach. D. The invitation for the event stated
10 that Romney was to “discuss his plans for the 2012 elections,” and that staff were to give “a
11 political briefing,” including “polling numbers, media appearances and other political activities.”
12 *Id.*

13 The Romney Respondents state that this was also a Free and Strong America event, not a
14 Romney testing-the-waters event. Second Romney Resp. at 4. They claim that “volunteers or
15 reporters” incorrectly “perceived the purpose of the event,” but do not dispute that the event in
16 fact involved Romney discussing his “plans for the 2012 elections.” *Id.* The event therefore was
17 a testing-the-waters event. *See* Advisory Op. 1986-06 at 4 (Fund for America’s Future, Inc.)
18 (“AO 1986-06”) (explaining that “holding meetings (which constitute more than incidental
19 contacts) with individuals or press regarding . . . a potential candidacy” is testing-the-waters
20 activity); AO 1981-32 at 4.

21 Third, on March 22, 2011, Romney reportedly met with fundraisers at the J.W. Marriott
22 Hotel in Washington, D.C., where he “said he needed to do well in the New Hampshire and
23 Florida primaries and Nevada’s caucuses,” and said that “he expected to win Nevada.” *Id.*,

1 Attach. H; *see also id.*, Attach. I. The *Wall Street Journal* described this meeting and another
2 reportedly held in New York City on March 24 as part of a "15-city push to secure financial
3 commitments from big-money 'bundlers,' hoping to reveal a fund-raising network that would
4 establish him as the prohibitive frontrunner for the Republican nomination for president." *Id.*,
5 Attach. H. Also, on March 24, 2011, Romney reportedly met with donors at the Harvard Club in
6 New York City and asked them "to raise between \$25,000 and \$50,000 for [him] within 90 days,
7 in an effort to post large fund-raising totals quickly." *Id.*, Attach. H. A Romney fundraiser at the
8 event reported that Romney told the fundraisers that he wanted to raise \$50 million "by early
9 summer, at the time of the first financial filing deadline of what is likely to be his official
10 presidential campaign." *Id.*, Attach. I. Romney told donors at this meeting, as he did at the
11 meeting on March 22, "that the primary season will be brutal" and that his "strategy is to win
12 two or three of the first states." *Id.*

13 On their face, these reports indicate that the March 22 and 24 events were testing-the-
14 waters activities since they report that Romney was soliciting funds for what was at least a
15 potential candidacy. *See* AO 1986-06 at 4 (explaining that "[s]oliciting funds, holding meetings
16 . . . with individuals or press regarding . . . a potential candidacy" is testing-the-waters activity);
17 AO 1981-32 at 5 (activity "oriented to ascertaining whether there is an initial base of support
18 adequate to launch a campaign effort" is testing the waters); AO 1985-40 at 4 (soliciting funds to
19 "be used for the purpose of [an individual's] testing-the-waters activities" is testing the waters).¹⁹

¹⁹ Indeed, the news reports can reasonably be read to suggest that Romney crossed the line from testing-the-waters to actual campaign activity at the March 22 and 24 events. Romney's reported statements regarding how he would fare in primary elections suggest he had by then made a decision to run. *See* 11 C.F.R. § 100.72(b)(3) (where an "individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office" it indicates he has decided to run). Furthermore, the reported fundraising efforts appear to have been for the purpose of raising money that would be used during the presidential campaign, which also indicates campaign activity. *See id.* § 100.72(b)(2) ("activities designed to amass campaign funds that would be spent after he or she becomes a candidate" indicates an individual has decided to run); *see also* AO 1985-40 at 4 (solicitations that "result

1 In their Second Response, the Romney Respondents claim that the March 22 and 24
2 events were Free and Strong America events, not Romney testing-the-waters events. Second
3 Romney Resp. at 5. They do not deny, however, that Romney asked fundraisers to raise money
4 for his 2012 campaign at those events. *See id.* Nor did they deny any of the other statements
5 attributed to Romney relating to the events in news reports covering his appearances. *See id.*
6 The Romney Respondents dismiss the article at attachment H as a reporter's "speculation," but
7 notably do not make the same claim for the article at attachment I, which contains a Romney
8 fundraiser's post-event report that Romney had asked attendees to raise \$50 million for his
9 campaign by early summer. *See id.*

10 Instead, the Romney Respondents argue that, "[a]s to the fundraising numbers discussed
11 in the article, there was nothing inappropriate about Governor Romney's supporters voluntarily
12 committing to raise a particular amount of money if he chose to run for president." Second
13 Romney Resp. at 5. But this argument fails to rebut — and indeed tends to confirm — the

in amassing campaign funds for [an individual's] use if he should become a candidate" constitutes campaign activity).

Despite these indicia that Romney may have moved beyond testing the waters to candidacy, we make no recommendations concerning that possibility at this time. The strongest evidence of Romney's candidacy — that the March 22 and 24 events were "activities designed to amass campaign funds" to be spent after he became a candidate, *see* 11 C.F.R. §§ 100.72(b)(2), 100.131(b)(2) — involves an application of the testing-the-waters regulations that the Commission has yet to address. Although in past matters the Commission has considered the amount of testing-the-waters funds already raised by a potential candidate (finding even significant sums insufficient to trigger candidate status, *see, e.g.*, MUR 6224 (Fiorina) (finding no reason to believe where a Senate candidate's campaign committee raised in excess of \$600,000 in contributions during the testing-the-waters phase of a campaign); MUR 5934 (Thompson) (dismissing complaint where a Presidential candidate's campaign committee raised over \$9 million and spent less than \$3 million prior to announcement of candidacy)), we are not aware of any instance in which the Commission has considered whether soliciting funds specifically for an imminent race would be sufficient by itself to trigger candidate status. At least one case has identified the amassing of campaign funds for use in a later campaign as one of many factors that indicated candidate status. *See* Conciliation Agreement at 4, MUR 5693 (Paul Arohnson) (citing among other factors language in a solicitation letter stating that money raised will be used "to prepare for the fight against [incumbent] Scott Garrett"). The use of that factor in MUR 5693, however, was accompanied by other factors (including strong statements of candidacy) and that matter provides little guidance as to when amassing campaign funds by itself triggers candidate status. Because any investigation into the scope of the testing-the-waters activity would by necessity also reveal additional facts about the March 22 and 24 events, we recommend that the Commission await further development of the record and take no action at this time as to whether Romney triggered candidate status under 11 C.F.R. §§ 100.72(b), 100.131(b) prior to April 11, 2011.

1 articles' indications that Romney was at least testing the waters. First, the argument confirms
2 that the fundraising discussed in the article was for Romney's presidential campaign, and not for
3 Free and Strong America's use or for some other purpose. Second, the argument confirms that
4 Romney was contemplating a choice whether to run for president. Third, even had Romney's
5 supporters "voluntarily commit[ed]" to raise the amounts discussed in the articles, as the
6 Romney Respondents claim, nothing in the testing-the-waters regulation requires Romney to
7 have solicited the funds to find that he conducted testing-the-waters activity or crossed the
8 candidate threshold under 11 C.F.R. §§ 100.72(b)(2), 100.131(b)(2).

9 Nonetheless, upon being afforded an additional opportunity to address whether Romney
10 solicited financial commitments at the March 22 and 24 events toward a possible presidential
11 campaign, *see* November 29 E-mail at 1, the Romney Respondents again did not deny that he
12 had. *See* Third Romney Resp. (Dec. 6, 2012). Accordingly, the reports that Romney solicited
13 potential donors to raise funds to be used for his potential campaign remain uncontested.

14 Instead, the Third Romney Response contends "that it would not be a violation of the law
15 for any person to commit *or* solicit support (formally or informally) for a then-nonexistent
16 presidential campaign at an event for some other entity." Third Romney Resp. at 1 (emphasis in
17 original). While not a violation of the law, the Commission has previously concluded that such
18 conduct would constitute testing-the-waters activity. *See* AO 1986-06 at 4 (explaining that
19 "[s]oliciting funds, holding meetings (which constitute more than incidental contacts) with
20 individuals or press regarding . . . a potential candidacy or regarding the formation of a campaign
21 organization" is testing-the-waters activity); AO 1985-40 at 4 (soliciting funds to "be used for
22 the purpose of [an individual's] testing-the-waters activities" qualifies as testing the waters).
23 Accordingly, the Third Romney Response offers nothing that would alter the conclusion that the

1 reported solicitations here support the inference that Romney tested the waters for a potential
2 candidacy during these events.

3 2. Free and Strong America Paid for Romney's Testing-the-Waters Activity
4 in Amounts Likely in Excess of \$5,000

5 The complaints, responses, Commission reports, and other public information show that
6 there is reason to believe Free and Strong America paid for costs relating to the Romney testing-
7 the-waters activities described above in amounts likely well in excess of the \$5,000 limit of
8 section 441a(a)(2)(A).

9 The Complaint alleges that Romney used funds from Free and Strong America "to pay
10 for expenses that should have been paid for by his presidential campaign," including "pay [for]
11 his top campaign staffers and consultants." Compl. at 4; *see id.*, Exs. A-C. The Romney
12 Respondents state that Free and Strong America paid Beeson and Newhouse (through their
13 respective companies). Second Romney Resp. at 3. A Free and Strong America disclosure
14 report states that Beeson's company, FLS Connect, was paid in excess of \$105,000 between
15 January 13 and April 11, 2011. *See* Free and Strong America PAC, Inc., 2011 Mid-Year Report
16 at 622, 623-24 (Feb. 14, 2012).

17 The Romney Respondents also state that Free and Strong America made expenditures
18 for, among other things, "fundraising travel to raise money and thank donors." Second Romney
19 Resp. at 2. They also state that the activities that took place on February 4, 18, March 9, 22, and
20 24, which we conclude were testing-the-waters activities, were Free and Strong America
21 fundraising and donor appreciation events. Second Romney Resp. at 4-5. The February 4 event
22 took place at the Boston Harbor Hotel, and Free and Strong America's disclosure report states
23 that it paid the Boston Harbor Hotel \$3,876.54 for "room rental and catering" on March 7, 2011.
24 *See* Free and Strong America PAC, Inc., Amended 2011 Mid-Year Report at 420 (Feb. 14,

1 2012). The March 9, 2011 event in Fort Lauderdale was organized by fundraising-consultant
2 Meredith O'Rourke, who was paid by Free and Strong America through a company called SJZ
3 LLC. February 23 Letter, Attach. D at 2. On March 9, 2011, Free and Strong America paid SJZ
4 LLC \$93,100, in addition to hundreds of thousands of dollars in payments Free and Strong
5 America made to SJZ LLC on contemporaneous dates leading up to April 11, 2011. *See* Free
6 and Strong America PAC, Inc., Amended 2011 Mid-Year Report at 665-69 (Feb. 14, 2012).

7 Additionally, a Free and Strong America disclosure report shows that it made
8 expenditures to the J.W. Marriott hotel in Washington, D.C. and the Harvard Club in New York
9 City contemporaneously with the March 22 and 24 Romney testing-the-waters events held there.
10 For instance, Free and Strong America paid at least \$9,172 for "travel expense[s]" to the J.W.
11 Marriott on Pennsylvania Ave. in Washington, D.C. on March 30, 2011. Free and Strong
12 America, Amended 2011 Mid-Year Report at 512-13 (Feb. 14, 2012). And Free and Strong
13 America paid \$14,312 to the Harvard Club on March 30 and May 4, 2011 for "Room Rental &
14 Catering for PAC." *Id.* at 489, 563.

15 While Romney for President paid Free and Strong America for the transfer of certain
16 assets to the campaign after April 11, 2011, *see* Romney Resp. at 2, there is nothing in the record
17 to suggest that Romney for President also reimbursed Free and Strong America for its
18 expenditures for Romney's testing-the-waters activity that took place before that date. An
19 investigation is necessary to determine the amount of Free and Strong America expenditures that
20 qualify as in-kind contributions to the Romney campaign, but the information detailed above
21 indicates that there is reason to believe that such expenditures were well in excess of the
22 \$5,000.²⁰ Accordingly, we recommend that the Commission find reason to believe that Free and

²⁰ *Cf.* First Gen. Counsel's Rpt. at 11-12, MUR 5908 (Duncan Hunter) (recommending reason to believe that a leadership PAC violated Section 441a(a) due to large expenditures it made contemporaneously with a future

1 Strong America violated 2 U.S.C. § 441a(a)(2)(A) by making excessive in-kind contributions to
2 Romney and Romney for President for testing-the-waters activity.

3 The responses indicate that as the honorary chairman of Free and Strong America and an
4 active participant in its events, Romney was aware that Free and Strong America was making
5 expenditures for the activities we have determined to be testing-the-waters events. *See, e.g.,*
6 Second Romney Resp. at 1-2. We therefore further recommend that the Commission find reason
7 to believe that Romney and Romney for President knowingly accepted such excessive in-kind
8 contributions in violation of 2 U.S.C. § 441a(f).²¹

candidate's testing-the-waters activity); Certification at 1, ¶ 3, MUR 5908 (Duncan Hunter) (Jan. 30, 2009) (adopting recommendation).

²¹ *Cf.* First Gen. Counsel's Rpt. at 11-12, MUR 5908 (Duncan Hunter) (recommending reason to believe a candidate violated Section 441a(f) due to his leadership PAC's excessive in-kind contributions for his testing-the-waters activity); Certification at 1, ¶¶ 1-2, MUR 5908 (Duncan Hunter) (Jan. 30, 2009) (adopting recommendation):

1 **B. There is Reason to Believe That Romney and Romney for President Failed to**
2 **Report Receipts and Disbursements Made During the Testing-the-Waters**
3 **Period**
4

5 When an individual who had been testing the waters subsequently becomes a candidate,
6 funds received and payments made for testing-the-waters activity become contributions and
7 expenditures subject to the reporting requirements of the Act. 11 C.F.R. §§ 100.72(a),
8 100.131(a). The Act requires the principal campaign committee of a candidate for President to
9 file reports disclosing, among other things, all receipts and disbursements. 2 U.S.C. § 434(a)(3),
10 (b); *see* 11 C.F.R. § 104.3(a)-(b). Contributions and expenditures relating to testing-the-waters
11 activity must be reported by the candidate's principal campaign committee in its first report filed,
12 regardless of the date the funds were received or the payments made by the candidate while
13 testing the waters. 11 C.F.R. §§ 100.72(a), 100.131(a).

14 Accordingly, once Romney became a candidate, his principal campaign committee was
15 responsible for reporting all receipts and disbursements during the testing-the-waters period.
16 Romney filed his statement of candidacy on April 11, 2011, and Romney for President filed its
17 first report relating to the 2012 election cycle on April 15, 2011, covering the period from
18 January 1, 2011 to March 31, 2011. That report states that Romney for President received no
19 contributions and made only \$3,798.46 in expenditures during that time and thus fails to satisfy
20 the duty to report all testing-the-waters activity. *See* Romney for President, 2011 April Quarterly
21 Report at 2 (Apr. 15, 2011).

22 We therefore recommend that the Commission find reason to believe that Romney for
23 President violated 2 U.S.C. § 434, 11 C.F.R. § 104.3, and 11 C.F.R. §§ 100.72 and 100.131.

C. There is No Reason to Believe That the State PACs Made Excessive In-Kind Contributions to Romney and Romney for President

Complainants also accuse the State PACs of making excessive in-kind contributions to Romney and Romney for President by paying “for expenses that should have been paid for by his presidential campaign.” Compl. at 4. Complainants take issue with the State PACs transfer of funds to Free and Strong America “to pay for staff salaries, consultant fees, and other expenses” that Complainants allege were used for Romney’s then “nascent presidential candidacy.” Compl. at 2. They argue that “when money is raised into a State PAC, it must be done for the purpose of influencing an election in that State,” and here, the transfer of State PAC money to Free and Strong America violated the Act. Second Compl. at 4; Third Compl. at 4.

Respondents reply that Free and Strong America and the State PACs engaged in non-federal election activity, and that the State PACs’ use of non-federal funds to pay for the non-federal share of Free and Strong America’s allocable joint administrative expenses — including employee salaries and travel costs — complied with 11 C.F.R. § 106.6(b)(1). Romney Resp. at 2; Second Romney Resp. at 2.

Under 11 C.F.R. § 106.6, a nonconnected political committee that engages in federal and non-federal election activity is permitted to pay for its administrative expenses with an allocated share of both federal and non-federal funds. Pursuant to section 106.6, Free and Strong America properly paid for its administrative expenses with funds from its federal account and from each of the State PACs’ non-federal accounts. *See* Romney Resp. at 2. Although section 106.6 no longer specifies the percentage of federal funds that must be used to pay for such administrative expenses, Free and Strong America paid for 50% of its administrative costs with federal funds as

1 a safe harbor.²² Romney Resp. at 3; *see also, e.g.*, Free and Strong America, Amended 2010 July
2 Monthly Report at 201 (Schedule H1) (Feb. 18, 2011).

3 Accordingly, we recommend that the Commission find that there is no reason to believe
4 that the State PACs made excessive in-kind contributions to Romney or Romney for President in
5 violation of 2 U.S.C. § 441a(a)(1)(A).

6 **D. There is No Reason to Believe That Excessive Contributions to Romney and**
7 **Romney for President Resulted from Donations to the State PACs**

8 Complainants allege that Romney and Romney for President violated the Act by
9 accepting contributions in excess of \$2,500 per election from donors to the State PACs. Compl.
10 at 3. They argue that the five- and six-figure donations made to the State PACs qualified as
11 "contributions" under the Act, and thus were subject to 2 U.S.C. § 441a(a)(1)(A). *Id.*

12 In the 2012 election cycle, the Act prohibited any person from making "contributions" in
13 excess of \$2,500 to a federal candidate or his or her authorized political committee with respect
14 to any election for federal office. 2 U.S.C. § 441a(a)(1)(A).²³ It is a violation for a candidate or
15 political committee to knowingly accept an excessive contribution. *Id.* § 441a(f). To qualify as
16 a "contribution," money or something else of value must be given "for the purpose of influencing
17 any election for Federal office." *Id.* § 431(8)(A)(i).

²² Free and Strong America appears to have chosen a 50% allocation based on a now-deleted provision of the Commission's regulations, 11 C.F.R. § 106.6(c). That provision required nonconnected political committees making federal and non-federal disbursements to use federal funds to pay for at least 50% of its administrative expenses. The D.C. Circuit held section 106.6(c) unconstitutional in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), explaining that a nonconnected political committee "may be forced to use [federal] money for, at most, a percentage of administrative expenses that 'closely' corresponds to the percentage of activities relating to its contributions" *Id.* at 17. In response, the Commission deleted section 106.6(c) from its regulations. *See* Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 75 Fed. Reg. 13,223, 13,223-24 (Mar. 19, 2010). Free and Strong America followed section 106.6(c) as a "safe harbor" since "the Commission has not yet provided revised regulations that take [*EMILY's List*] into account." Romney Resp. at 3.

²³ *See* Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 Fed. Reg. 8368, 8369 (Feb. 14, 2011) (adjusting section 441a(a)(1)(A)'s limit for inflation).

1 The State PACs state that they have never spent any of the donations they have received
2 for federal election purposes, State PACs Resp. at 2, and no available information contradicts
3 that claim, nor suggests that their donations were solicited for federal purposes.²⁴ As a result,
4 donations to the State PACs were not “contributions,” and therefore were not subject to section
5 441a(a)(1)(A).

6 Complainants point out that certain donors to the State PACs, such as Richard Marriott,
7 made public statements suggesting that they intended for their donations to the State PACs to be
8 used to help Romney’s then-anticipated presidential campaign. Compl. at 2. Complainants
9 argue that therefore these donations qualify as “contributions,” since they were made by donors
10 “for the purpose of influencing” a federal election. *Id.* at 3-4. But whether a “contribution” has
11 been made does not turn on the subjective intent of the donor, and the Commission is permitted
12 to take into account “the nature of the funded event.” *Orloski v. FEC*, 795 F.2d 156, 162 (D.C.
13 Cir. 1986). Were it otherwise, the D.C. Circuit has pointed out, the recipient of a donation could
14 be liable for receiving an excessive or prohibited contribution even where the donation was not,
15 in fact, used for federal election purposes. *Id.*

16 Accordingly, we recommend that the Commission find no reason to believe that the State
17 PACs, Free and Strong America, Romney, or Romney for President knowingly accepted
18 excessive contributions from the donors to the State PACs in violation of 2 U.S.C. § 441a(f).

19 **E. The Commission Should Take No Action on the Complaint’s Allegation That**
20 **Romney Violated the Act if the State PACs Raised or Spent Non-Federal**
21 **Funds After Romney Became a Candidate**
22

23 Under the Act, an “entity directly or indirectly established, financed, maintained or
24 controlled by” a candidate may not “solicit, receive, direct, transfer, or spend” non-federal funds

²⁴ As discussed above in Part III.C, the State PACs’ transfers of funds to Free and Strong America did not constitute contributions or expenditures for federal election purposes.

1 in connection with any federal or non-federal election. 2 U.S.C. § 441i(e)(1)(A)-(B); *see* 11
2 C.F.R. §§ 300.60(d), 300.61, 300.62 (implementing section 441i(e)(1)).

3 The complaints contend that the State PACs became subject to the prohibitions of
4 2 U.S.C. § 441i(e)(1), when Romney became a candidate for president because he “established”
5 the State PACs. Therefore, the Complaints claim, Romney would have violated section
6 441i(e)(1) if the State PACs continued to solicit, receive, and spend non-federal funds after
7 Romney became a candidate. Compl. at 5; Second Compl. at 5; Third Compl. at 5.

8 Romney was not a candidate when the State PACs were established, as would have been
9 required for the State PACs to become subject to section 441i(e) on that basis. *See* 2 U.S.C.
10 § 441i(e)(1) (stating that an “entity directly or indirectly established . . . by . . . 1 or more
11 candidates” is subject to the soft-money ban). The complaints and publicly available information
12 indicate that the Alabama PAC was established on October 1, 2008;²⁵ the Iowa PAC was
13 established as early as 2004;²⁶ the Michigan PAC was established on June 24, 2004;²⁷ the New
14 Hampshire PAC was established on March 9, 2006;²⁸ and the South Carolina PAC was
15 established on June 4, 2004.²⁹ Romney was a candidate in the 2008 presidential race from
16 February 13, 2007 to February 7, 2008. For the 2012 presidential election, Romney filed his
17 statement of candidacy on April 11, 2011. Thus, even assuming that Romney established the

²⁵ Compl., Ex. D at 2.

²⁶ Free and Strong America—Iowa received its first reported contribution in 2004. *See*
[https://webapp.icfdb.iowa.gov/PublicView/statewide/2004/Period_Due_Date_19-Jul/PACs/
Commonwealth%20PAC%2C%20The_9705/The%20Commonwealth%20PAC_9705_2_Summary.pdf](https://webapp.icfdb.iowa.gov/PublicView/statewide/2004/Period_Due_Date_19-Jul/PACs/Commonwealth%20PAC%2C%20The_9705/The%20Commonwealth%20PAC_9705_2_Summary.pdf)

²⁷ Michigan Dept. of State, Bureau of Elections, The Commonwealth PAC—Michigan, Statement of
Organization (Jun. 25, 2004), *available at* http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=512297.

²⁸ State of New Hampshire, Commonwealth PAC, Political Committee Registration (Mar. 9, 2006).

²⁹ Compl., Ex. D. at 9.

1 State PACs, he did so while he was not a candidate and thus the State PACs did not become
2 subject to Section 441i(e) on that basis.

3 Nevertheless, we recommend that the Commission take no action at this time on
4 Complainants' allegation that the State PACs were subject to section 441i(e)'s restrictions "as
5 soon as Mr. Romney became a presidential candidate." Compl. at 5. As discussed above, *see*
6 *supra* n. 19, an investigation in this matter could reveal that Romney triggered candidate status
7 under the Act sooner than April 11, 2011, when he filed his Statement of Candidacy. If Romney
8 became a candidate before his March 31, 2011 disassociation from the State PACs, it may be the
9 case that the State PACs became subject to Section 441i(e) because Romney "financed,
10 maintained or controlled" the State PACs at that time.

11 IV. INVESTIGATION

12 Upon a reason-to-believe finding of the Commission, we intend conduct an investigation
13 into the nature and scope of Romney's apparent testing-the-waters activities and the amount of
14 expenditures Free and Strong America made for those activities. Although we will attempt to
15 conduct the investigation informally, formal discovery may be necessary. We therefore
16 recommend authorizing the use of compulsory process, as necessary.

17 V. RECOMMENDATIONS

- 18 1. Find reason to believe that Free and Strong America violated 2 U.S.C.
19 § 441a(a)(2)(A) by making excessive in-kind contributions to Romney and Romney
20 for President for testing-the-waters activity;
- 21 2. Find reason to believe that Romney and Romney for President violated 2 U.S.C.
22 § 441a(f) by knowingly accepting excessive in-kind contributions for testing-the-
23 waters activity from Free and Strong America;
- 24 3. Find reason to believe that Romney for President violated 2 U.S.C. § 434, 11 C.F.R.
25 § 103.3, and 11 C.F.R. §§ 100.72, 100.131 by failing to report Romney's testing-the-
26 waters activity;

4. Find no reason to believe that that Free and Strong America violated 2 U.S.C. § 441a(a)(2)(A) by making excessive in-kind contributions to Romney and Romney for President under 11 C.F.R. § 110.2(f);
5. Find no reason to believe that the State PACs violated 2 U.S.C. § 441a(a)(1)(A) by making excessive in-kind contributions to Romney and Romney for President;
6. Find no reason to believe that the State PACs, Free and Strong America, or Romney for President violated 2 U.S.C. § 441a(f) by knowingly accepting excessive contributions from donors to the State PACs;
7. Take no action at this time on Complainants' allegation that Romney violated 2 U.S.C. § 441i(e) if the State PACs received or spent non-federal funds after Romney became a presidential candidate;
8. Authorize the use of compulsory process;
9. Approve the attached Factual and Legal Analyses; and
10. Approve the appropriate letters.

DATE

4/28/14

Daniel A. Petalas

Associate General Counsel for Enforcement

William A. Powers

Assistant General Counsel

Kevin P. Hancock

Attorney